NO. 01 839 NOV 27 2001

OFFICE OF THE CLERK

In The Supreme Court of the United States

CHRISTOPHER THOUSAND,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

On Petition for a *Writ* of *Certiorari* to the Michigan Supreme Court

---

PETITION FOR *WRIT* OF *CERTIORARI*

Christopher Thousand
Suite 604, One Northland Plaza
20755 Greenfield Road
Southfield, Michigan 48075
(248) 569-0888

Petitioner Pro Se

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

103 pp

QUESTION PRESENTED FOR REVIEW

Does a state appellate court violate the United States Constitution's Due Process Clause and Ex Post Facto prohibition if it eliminates the common-law defense of impossibility and applies that change in law to the defendant in the case, thus imposing an unexpected retroactive change in the substantive law to be applied to the defendant's conduct?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

TABLE OF CONTENTS (CONT'D)

Page

REASON FOR GRANTING THE WRIT:

THE DECISION OF THE MICHIGAN SUPREME COURT TO ELIMINATE THE IMPOSSIBILITY DEFENSE IN A RETROACTIVE MANNER IN THE PROSECUTION OF THE PETITIONER FOR CRIMINAL ATTEMPT VIOLATES THE PRINCIPLES RECENTLY SET FORTH IN *ROGERS V. TENNESSEE*, 121 S. CT. 1693 (2001), FOR THE DECISION CONSTITUTED A DEPRIVATION OF DUE PROCESS AND HAD THE EFFECT OF AN UNLAWFUL EX POST FACTO LAW 8

CONCLUSION 16

APPENDIX

TABLE OF AUTHORITIES

Cases **Page**

Bouie v. City of Columbia, 378 U.S. 347 (1964) ..... *passim*

Ex Parte United States, 242 U.S. 27 (1916) 14

People v. Cain, 238 Mich. App. 95, 605 N.W.2d 28 (1999) 12

People v. Genoa, 188 Mich. App. 461, 470 N.W.2d 447 (1991) 12

People v. Jacoboni, 34 Mich. App. 84, 190 N.W.2d 720 (1971) 12

People v. Ng, 156 Mich. App. 779, 402 N.W.2d 500 (1986) 12

People v. Thousand, 241 Mich. App. 102, 614 N.W.2d 674 (2000) 1, 12

People v. Thousand, ___ Mich. ___, 631 N.W.2d 694 (2001) 1

TABLE OF AUTHORITIES (CONT'D)

Cases **Page**

People v. Tinskey, 394 Mich. 108, 228 N.W.2d 782 (1975) 11, 12

Rogers v. Tennessee, 121 S. Ct. 1693 (2001) ..... *passim*

United States v. Lanier, 520 U.S. 259 (1997) 14

Statutes

28 U.S.C. § 1257 2

MCL 722.675; MSA 25.254 3

MCL 750.92; MSA 28.287 ..... 2, 3

MCL 750.145c; MSA 28.342a 3

MCL 750.157b; MSA 28.354 3

Other

U.S. Const. amend. XIV 2, 8

U.S. Const., art. I, § 9 2

OPINIONS AND ORDERS BELOW

The decision of the Michigan Supreme Court denying the Motion for Rehearing of Petitioner Christopher Thousand was issued on September 11, 2001. It is set out in the Appendix at page A-1. The written opinion of the Michigan Supreme Court, dated July 27, 2001, and reported as *People v. Thousand*, ___ Mich. ___, 631 N.W.2d 694 (2001), is set out in the Appendix at page A-3. The ruling of the Michigan Court of Appeals, dated May 12, 2000, and reported as *People v. Thousand*, 241 Mich. App. 102, 614 N.W.2d 674 (2000), is set out in the Appendix at page A-55. The ruling of the Wayne Circuit Court, dated May 28, 1999, appears in the Appendix at page A-74.

STATEMENT OF JURISDICTION

The final order of the Michigan Supreme Court from which this action is taken was issued on September 11, 2001. In that order, the Michigan Supreme Court denied Petitioner Christopher Thousand's Motion for Rehearing, which had requested the court to reconsider its prior decision, issued on July 27, 2001, refusing to recognize the applicability of the defense of impossibility to several charges against Thousand. In the Motion for Rehearing, Thousand argued that the court's retroactive modification of substantive criminal law violated the Due Process Clause and the ex post facto provision of the

United States Constitution. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 9 of the United States Constitution states in pertinent part:

> No Bill of Attander or ex post facto Law shall be passed.

MCL 750.92; MSA 28.287 states in pertinent part:

> Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same,

when no express provision is made by law for the punishment of such attempt, shall be punished[.]

STATEMENT OF THE CASE

Petitioner Christopher Thousand was charged by information in the Circuit Court of Wayne County, Michigan, on three counts: (1) commission of child sexually abusive activity, in violation of MCL 750.145c(2); MSA 28.342a(2); (2) solicitation to commit third-degree criminal sexual conduct, in violation of MCL 750.157b(3)(a); MSA 28.354(2)(3)(a), and attempted distribution of obscene material to a minor, in violation of MCL 750.92; MSA 28.287 and MCL 722.675; MSA 25.254(5). Each charge arose from four electronic Internet conversations between Thousand and William Liczbinski, a Wayne County Sheriff's Deputy who was pretending to be a 14-year-old girl. During the course of the Internet conversations, Thousand made several sexually suggestive remarks to Liczbinski indicating his desire to have sexual relations with Liczbinski and, at one point, sent a picture of his penis to Liczbinski through the Internet. In their final conversation, Thousand and Liczbinski agreed to meet at a McDonald's in the Bel-Air Shopping Center in Detroit, and Thousand was arrested when he entered the McDonald's.

Prior to trial in the Wayne County Circuit Court, Thousand moved to quash the information and to dismiss the case on the basis of the defense of impossibility, arguing that each charge against him required the existence of a minor victim or potential victim, and the nonexistence of such a minor in his case precluded his conviction. On May 28, 1999, the trial court granted Thousand's motion to quash with regard to each count, ruling that the existence of a minor was indeed an element of each offense, and, thus, it was impossible for the State to prove all of the elements of the crimes with which Thousand was charged.

The State appealed the dismissal of the case to the Court of Appeals, which, in a decision dated May 12, 2000, upheld the decision of the trial court with regard to the counts charging solicitation to commit third-degree criminal sexual conduct and attempted distribution of obscene material to a minor but reversed the ruling of the trial court with regard to the charge of child sexually abusive activity. (App. at A-53.) After engaging in a lengthy discussion of the defense of legal impossibility, the Court of Appeals concluded:

> Turning then to the case at bar, we believe that defendant's conduct with respect to two of the charges represents legal impossibility and, therefore, the trial court properly dismissed the charges.

614 N.W.2d at 678 (App. at A-62).

The State of Michigan then filed an Application for Leave to Appeal with the Michigan Supreme Court, arguing that the Michigan Court of Appeals had erred in upholding the dismissal of two counts on the basis of impossibility and contending that the Michigan Supreme Court should repudiate the defense of legal impossibility in all cases. Thousand responded with a brief which pointed out that if the Michigan Supreme Court were to abandon the defense of impossibility, it could not do so as to him, for such an action would constitute a violation of the principles set forth in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and other cases which concluded that judicial abrogation of criminal defenses could not be done retroactively. An excerpt from Thousand's brief is set out in the Appendix at A-76.

A majority of the Michigan Supreme Court ruled on July 27, 2001, that the defense of impossibility could not be raised by Thousand and, in fact, had never been a part of the law of Michigan. This latter determination was made despite the fact that one 1975 Michigan Supreme Court case and five Michigan Court of Appeals cases (including the ruling of the Court of Appeals in this case) had recognized and evaluated the defense of impossibility raised by defendants. Indeed, three cases in Michigan dating from 1975 to 2000 had found that the defense of impossibility operated to preclude the

conviction of the defendants on particular charges. The majority decision of the Michigan Supreme Court regarding the defense of impossibility provoked an unusually sharp and critical response in a dissenting opinion, which stated that

> neither the law nor society is served by allowing the end of removing [alleged child predators] from society to excuse *unjust means* to accomplish it.

(Justice Kelly's Opinion at 9; App. at A-44 (emphasis added).) Justice Kelley further pointed out, having previously discussed the Michigan case law regarding the defense of impossibility, that

> [i]n this case, defendant raised a legal impossibility argument that is supported by Michigan case law. The majority, in determinating that legal impossibility is not a viable defense in this state, *ignores that law.*

(*Id.;* App. at A-44 (emphasis added).)

Following the ruling by the Michigan Supreme Court, Thousand filed a Motion for Rehearing, again raising the due process and ex post facto issue and pointing out that the court could not avoid the problem

simply by ignoring prior precedent with regard to the defense of impossibility. A portion of Thousand's Motion for Rehearing is set out in the Appendix at A-81. The motion was summarily denied, although two justices, Justice Cavanagh and Justice Kelly, would have granted rehearing. (App. at A-35.)

REASON FOR GRANTING THE WRIT

THE DECISION OF THE MICHIGAN SUPREME COURT TO ELIMINATE THE IMPOSSIBILITY DEFENSE IN A RETROACTIVE MANNER IN THE PROSECUTION OF THE PETITIONER FOR CRIMINAL ATTEMPT VIOLATES THE PRINCIPLES RECENTLY SET FORTH IN *ROGERS V. TENNESSEE*, 121 S. CT. 1693 (2001), FOR THE DECISION CONSTITUTED A DEPRIVATION OF DUE PROCESS AND HAD THE EFFECT OF AN UNLAWFUL EX POST FACTO LAW.

In *Rogers v. Tennessee*, 121 S. Ct. 1693 (2001), the Court determined that fundamental principles of fairness inherent in the Due Process Clause of the Fourteenth Amendment to the United States Constitution prevent courts from abandoning established common-law rules and applying new rules to prior conduct of criminal defendants except in limited circumstances. Only where the modification of prior common law doctrine is not "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" will a court be permitted to change the common law in a way which prejudices a criminal defendant. *Id.* at 1700 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354

(1964)). In essence, the Court in *Bouie v. City of Columbia*, which involved the retroactive application of judicial interpretation of criminal statutes, to the interpretation of common-law rules in criminal law, while clarifying that it is the Due Process Clause which is the primary source of those principles.

The Court ultimately determined in *Rogers v. Tennessee* that the modification of the "year and a day" rule did not violate any due process rights of the defendant, but the Court's analysis in that case actually requires the opposite result in this case. This case thus provides a compelling vehicle for this Court to refine further the due process analysis set out in *Rogers v. Tennessee*, and to correct the erroneous and unfair decision of the Michigan Supreme Court with regard to the Petitioner.[1]

---

[1]In a real sense the decision of the Michigan Supreme Court can be seen as both a retroactive change in an interpretation of common law and a retroactive change in the interpretation of a statute, for, as was pointed out by Justice Kelly's dissenting opinion in the Michigan Supreme Court ruling, the Michigan attempt statute incorporated the common-law rules regarding attempts and its language shows that the Michigan legislature did not intend to punish conduct that a mistake of legal fact renders unprohibited:

In determining the issue of whether modification of the "year and a day" rule would unfairly prejudice the defendant, the Court in *Rogers v. Tennessee* stated that the "most important" consideration was that the rule "had only the most tenuous foothold" as part of the criminal law in Tennessee. 121 S. Ct. at 1701. Indeed, the Court

---

> The attempt statute makes illegal an ". . . attempt to commit an *offense prohibited by law* . . ." MCL 750.92 (emphasis added). It does not make illegal an action not prohibited by law. Hence, one may conclude, the impossibility of completing the underlying crime can provide a defense to attempt.

(Dissenting Opinion of Justice Kelly at 5; App. at A-39-40.) Therefore, the conclusion by the Michigan Supreme Court that it could validly refuse to recognize the existence of an impossibility defense is contradicted by the language used in the attempt statute. As stated by Justice Kelly, "[i]f an element of the offense cannot be established, an accused cannot be found guilty of the prohibited act." *Id.* The Michigan Supreme Court's determination that it could ignore settled and widely recognized rulings concerning the defense of impossibility thus also plainly violates this Court's ruling in *Bouie v. City of Columbia.*

noted that the rule had never once served as a ground of decision in any prosecution in the State, and that it had been mentioned only three times, in dicta, in reported Tennessee cases. *Id.* "There is, in short," the Court concluded, "nothing to indicate that the Tennessee court's abolition of the rule in petitioner's case represented an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect." *Id.* at 1703.

The same certainly cannot be said in this case, as it is uncontroverted that the Michigan courts have very recently recognized and applied the defense of impossibility in numerous cases, including in the decision of the Michigan Court of Appeals in this case. Indeed, as was pointed out by Justice Kelly in this case, the Michigan Supreme Court itself recognized the impossibility defense in *People v. Tinskey*, 394 Mich. 108, 228 N.W.2d 782 (1975). (Kelly at 2-3; App. at A-36-37.) The Michigan Supreme Court stated in *Tinskey* rather unequivocally that "at common law the general rule is that while factual impossibility is not a defense (*People v. Jones*, 46 Mich. 441, 9 N.W. 486 [1881]), legal impossibility is a defense." 228 N.W.2d at 783. The holding in *Tinskey*, that a defendant could not be convicted of conspiracy to commit abortion if the woman who was to have the abortion was not in fact pregnant, rested squarely on the Michigan Supreme Court's reasoning that "the legislature

has not . . . indicated that impossibility is not a defense." *Id.*

Following *People v. Tinskey,* in *People v. Ng,* 156 Mich. App. 779, 402 N.W.2d 500 (1986), the Michigan Court of Appeals examined the defendant's claim of impossibility in an attempted murder case, recognized legal impossibility as a valid defense to an attempted crime, but concluded that the defendant could not show the elements of the defense. The court specifically and directly relied upon *People v. Tinskey* for its conclusion that legal impossibility was a defense in Michigan. 402 N.W.2d at 504. Other Michigan cases clearly have recognized the defense of impossibility as a part of the Michigan law of criminal attempts. *See People v. Cain,* 238 Mich. App. 95, 605 N.W.2d 28 (1999) (acknowledged viability of legal impossibility defense); *People v. Genoa,* 188 Mich. App. 461, 470 N.W.2d 447 (1991) (upheld trial court's dismissal of charge of attempted possession with intent to deliver cocaine on the basis of the fact that it was legally impossible for the defendant to have committed the offense); *People v. Jacoboni,* 34 Mich. App. 84, 190 N.W.2d 720 (1971) (discussed defense of legal impossibility with regard to crime of bribing public official where person who accepted bribe was not a public official within the meaning of the statute); *People v. Thousand,* 241 Mich. App. 102, 614 N.W.2d 674 (2000) (dismissed two counts against defendant on the basis of the defense of impossibility).

Thus, unlike the situation posed in *Rogers v. Tennessee*, this case presents to the Court the situation in which an active, viable defense to a criminal charge has been unexpectedly abrogated by judicial fiat, and a criminal defendant has been deprived of a defense which was recognized at the time of the alleged crimes. In fact, the change in law was so unanticipated that the Michigan Court of Appeals applied the defense in Thousand's favor before it was reversed by the Michigan Supreme Court. Using the test used by the Court in *Rogers v. Tennessee*, it could not be more obvious that Thousand had "no fair warning" of the change in the law, and that the change was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Id.* at 1700.

This conclusion cannot be altered by the fact that the Michigan Supreme Court couched its decision as a determination that the defense of impossibility had not been previously part of the law of Michigan. Such a determination was the very essence of arbitrary judicial action, for, as discussed above, the court had itself applied the defense on one occasion and numerous Michigan Court of Appeals decisions over a time span of decades had recognized it as part of the law of criminal attempt. While it may generally be true that a Michigan court should be the expositor of Michigan law, this general rule does not mean that this Court should be blind to clear abuses of judicial power. The Due Process

Clause prohibits a state court from acting arbitrarily and capriciously in any context. *See Bouie v. City of Columbia* (state supreme court cannot construe state statute in arbitrary way by unexpectedly interpreting statute to cover conduct not within language of statute); *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"); *Ex Parte United States*, 242 U.S. 27 (1916) (judicial discretion regarding the temporary suspension of a sentence for some particular reason does not give the court the authority to arbitrarily refuse to enforce the law by refusing to impose sentence). This Court, or any federal court, could not enforce the Due Process Clause in this context if it permitted a state court to modify substantive law in a retroactive manner and then simply deny that it had done so by arbitrarily stating that the law had not been changed.

Finally, if in fact the Court were to determine for some reason that the Michigan Supreme Court's action satisfied the *Rogers v. Tennessee* test for evaluating the validity of a state court action which changed the law applicable to a particular criminal defendant, then this case demonstrates that the *Rogers v. Tennessee* test is not adequate and must be revised. If this Court cannot find under application of *Rogers v. Tennessee* that the Michigan Supreme Court could not retroactively abrogate a widely

recognized and repeatedly applied defense to a criminal charge, then this Court must revisit this issue to formulate a fairer, more workable test for use in cases involving judicial modification of common law. Indeed, this case provides a concrete example of the fears expressed by Justice Scalia in his dissenting opinion in *Rogers v. Tennessee*, in which he argued for the use of ex post facto principles in deciding such cases. As discussed by Justice Scalia, there is no reason that a state court should be able to accomplish the retroactive criminalization of conduct not previously criminal when a state legislature clearly cannot do so under the Ex Post Facto Clause. *Id.* at 1705.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Christopher Thousand, requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

CHRISTOPHER THOUSAND, Pro Se
Suite 604, One Northland Plaza
20755 Greenfield Road
Southfield, Michigan 48075
(248) 569-0888

No. _____

In The Supreme Court of the United States

CHRISTOPHER THOUSAND,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

On Petition for a *Writ* of *Certiorari* to the Michigan Supreme Court

APPENDIX

Christopher Thousand
Suite 604, One Northland Plaza
20755 Greenfield Road
Southfield, Michigan 48075
(248) 569-0888

Petitioner Pro Se

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

Page

Michigan Supreme Court Order dated September 11, 2001 ..... A-1

Michigan Supreme Court Opinion dated July 27, 2001 ..... A-3

Michigan Court of Appeals Opinion dated May 12, 2000 ..... A-53

Trial Court Ruling [Excerpt] A-74

Excerpt from Thousand's Application to Michigan Supreme Court for Leave to Appeal as Cross-Appellant A-75

Excerpt from Thousand's Motion for Rehearing A-78

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

Order

Entered: September 11, 2001

Maura D. Corrigan,
Chief Justice

Rehearing No. 465
116967
9 March 2001

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/
Cross-Appellee,

SC: 116967
COA: 22083
Wayne CC: 99-000798

v

CHRISTOPHER THOUSAND,

Defendant-Appellee/
Cross-Appellant.

In this cause a motion for rehearing is considered, and it is hereby DENIED.

Cavanagh and Kelly, JJ., would grant rehearing.

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 11, 2001 Corbin R. Davis
Clerk

MICHIGAN SUPREME COURT
LANSING, MICHIGAN 48909

Chief Justice
Maura D. Corrigan

Opinion

Justices
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman

FILED JULY 27, 2001

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v. No. 116967

CHRISTOPHER THOUSAND,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH
YOUNG, J.

We granted leave in this case to consider whether the doctrine of "impossibility" provides a defense to a charge of attempt to commit an offense prohibited by law under MCL 750.92, or to a charge of solicitation to commit a felony under MCL 750.157b. The circuit court granted defendant's motion to quash and dismissed all charges against him on the basis that it was legally impossible for him to have committed any of the charged crimes. We conclude that the concept of impossibility, which this Court has never adopted as a defense, is not relevant to a determination whether a defendant has committed attempt under MCL 750.92, and that the circuit court therefore erred in dismissing the charge of attempted distribution of obscene material to a minor on the basis of the doctrine of legal impossibility. We additionally conclude that, although the Court of Appeals erred to the extent that it relied upon the concept of "impossibility" in dismissing the charge of solicitation of third-degree criminal sexual conduct, the charge was nevertheless properly dismissed because there is no evidence that defendant solicited any person to "*commit a felony*" or to "do or omit to do an act which if completed would *constitute a felony*" as proscribed by MCL 750.157b. Accordingly, we reverse in part and affirm in part the decision of the Court of Appeals and remand this matter to the circuit court for proceedings consistent with this opinion.

I. FACTUAL[1] AND PROCEDURAL BACKGROUND

Deputy William Liczbinski was assigned by the Wayne County Sheriff's Department to conduct an undercover investigation for the department's Internet Crimes Bureau. Liczbinski was instructed to pose as a minor and log onto "chat rooms" on the Internet for the purpose of identifying persons using the Internet as a means for engaging in criminal activity.

On December 8, 1998, while using the screen name "Bekka," Liczbinski was approached by defendant, who was using the screen name "Mr. Auto-Mag," in an Internet chat room. Defendant described himself as a twenty-three-year-old male from Warren, and Bekka described herself as a fourteen-year-old female from Detroit. Bekka indicated that her name was Becky Fellins, and defendant revealed that his name was Chris Thousand. During this initial conversation, defendant sent Bekka, via the Internet, a photograph of his face.

---

[1]This case has not yet been tried. Our statement of facts is derived from the preliminary examination and motion hearing transcripts and from the documentation contained in the lower court record, including computer printouts of the Internet dialogue between "Bekka" and "Mr. Auto-Mag."

From December 9 through 16, 1998, Liczbinski, still using the screen name "Bekka," engaged in chat room conversation with defendant. During these exchanges, the conversation became sexually explicit. Defendant made repeated lewd invitations to Bekka to engage in various sexual acts, despite various indications of her young age.[2]

During one of his online conversations with Bekka, after asking her whether anyone was "around there," watching her, defendant indicated that he was sending her a picture of himself. Within seconds, Liczbinski received over the Internet a photograph of male genitalia. Defendant asked Bekka whether she liked and wanted it and whether she was getting "hot" yet, and described in a graphic manner the type of sexual acts he wished to perform with her. Defendant invited Bekka to come see him at his house for the purpose of engaging in sexual

---

[2]Defendant at one point asked Bekka, "Ain't I a lil [sic] old??" Upon Bekka's negative reply, defendant asked, "[Y]ou like us old guys?" Bekka explained that boys her age "act like little kids," and reiterated that she was fourteen years old. Bekka mentioned that her birthday was in 1984 and that she was in ninth grade, and defendant asked when she would be fifteen. Defendant asked whether Bekka was still "pure," to which Bekka responded that she was not, but that she did not have a lot of experience and that she was nervous.

activity. Bekka replied that she wanted to do so, and defendant cautioned her that they had to be careful, because he could "go to jail." Defendant asked whether Bekka looked "over sixteen," so that if his roommates were home he could lie.

The two then planned to meet at an area McDonald's restaurant at 5:00 p.m. on the following Thursday. Defendant indicated that they could go to his house, and that he would tell his brother that Bekka was seventeen. Defendant instructed Bekka to wear a "nice sexy skirt," something that he could "get [his] head into." Defendant indicated that he would be dressed in black pants and shirt and a brown suede coat, and that he would be driving a green Duster. Bekka asked defendant to bring her a present, and indicated that she liked white teddy bears.

On Thursday, December 17, 1998, Liczbinski and other deputy sheriffs were present at the specified McDonald's restaurant when they saw defendant inside a vehicle matching the description given to Bekka by defendant. Defendant, who was wearing a brown suede jacket and black pants, got out of the vehicle and entered the restaurant. Liczbinski recognized defendant's face from the photograph that had been sent to Bekka. Defendant looked around for approximately thirty seconds before leaving the restaurant. Defendant was then taken into custody. Two white teddy bears were

recovered from defendant's vehicle. Defendant's computer was subsequently seized from his home. A search of the hard drive revealed electronic logs of Internet conversations matching those printed out by Liczbinski from the Wayne County-owned computer he had used in his Internet conversations with defendant.

Following a preliminary examination, defendant was bound over for trial on charges of solicitation to commit third-degree criminal sexual conduct, MCL 750.157b(3)(a) and 750.520d(1)(a), attempted distribution of obscene material to a minor, MCL 750.92 and 722.675, and child sexually abusive activity, MCL 750.145c(2).[3]

Defendant brought a motion to quash the information, arguing that, because the existence of a child victim was an element of each of the charged offenses, the evidence was legally insufficient to support the charges.

---

[3]The prosecution's motion to add a count of attempted third-degree criminal sexual conduct was denied by the district court.

Additionally, although the original information charged defendant with distribution of obscene material to a minor, the circuit court subsequently granted the prosecution's motion to amend the charge to *attempted* distribution of obscene material to a minor.

The circuit court agreed and dismissed the case, holding that it was legally impossible for defendant to have committed the charged offenses. The Court of Appeals affirmed the dismissal of the charges of solicitation and attempted distribution of obscene material to a minor, but reversed the dismissal of the charge of child sexually abusive activity.[4] 241 Mich App 102 (2000).

We granted the prosecution's application for leave to appeal.[5] 463 Mich 906 (2000).

---

[4]The Court of Appeals concluded that, because the child sexually abusive activity statute proscribes mere *preparation* to engage in such activity, the circuit court erred in dismissing that charge on the basis of the doctrine of legal impossibility. 241 Mich App 102, 115-117; 614 NW2d 674 (2000). We denied defendant's application for leave to appeal from this portion of the Court of Appeals opinion, and this charge is not presently before us.

[5]In our order, we specifically directed the parties to address (1) whether legal impossibility is a viable defense under the circumstances of this case, and (2) whether the attempt statute codified the legal impossibility defense as part of the common law of attempt.

II. STANDARD OF REVIEW

We must determine in this case whether the circuit court and the Court of Appeals properly applied the doctrine of "legal impossibility" in concluding that the charges against defendant of attempt and solicitation must be dismissed. The applicability of a legal doctrine is a question of law that is reviewed de novo. *James v Alberts*, 464 Mich 12, 14; 626 NW2d 158 (2001). Similarly, the issue whether "impossibility" is a cognizable defense under Michigan's attempt and solicitation statutes presents questions of statutory construction, which we review de novo. *People v Clark*, 463 Mich 459, 463, n 9; 619 NW2d 538 (2000); *People v Morey*, 461 Mich 325, 329; 603 NW2d 250 (1999).

III. ANALYSIS

A. The "Impossibility" Doctrine.

The doctrine of "impossibility" as it has been discussed in the context of inchoate crimes represents the conceptual dilemma that arises when, because of the defendant's mistake of fact or law, his actions could not possibly have resulted in the commission of the substantive crime underlying an attempt charge. Classic illustrations of the concept of impossibility include: (1) the defendant is prosecuted for attempted larceny after he

tries to "pick" the victim's empty pocket;[6] (2) the defendant is prosecuted for attempted rape after he tries to have nonconsensual intercourse, but is unsuccessful because he is impotent;[7] (3) the defendant is prosecuted for attempting to receive stolen property where the property he received was not, in fact, stolen;[8] and (4) the defendant is prosecuted for attempting to hunt deer out of season after he shoots at a stuffed decoy deer.[9] In each of these examples, despite evidence of the defendant's criminal intent, he cannot be prosecuted for the *completed* offense of larceny, rape, receiving stolen property, or hunting deer out of season, because proof of at least one element of each offense cannot be derived from his objective actions. The question, then, becomes whether the defendant can be prosecuted for the *attempted* offense, and the answer is dependent upon whether he may raise the defense of "impossibility."

---

[6]See *People v Jones*, 46 Mich 441; 9 NW 486 (1881); *Commonwealth v McDonald*, 59 Mass 365 (1850); *People v Twiggs*, 223 Cal App 2d 455; 35 Cal Rptr 859 (1963).

[7]See *Waters v State*, 2 Md App 216; 234 A2d 147 (1967).

[8]See *Booth v State*, 398 P2d 863 (Okla Crim App, 1964); *People v Jaffe*, 185 NY 497; 78 NE 169 (1906).

[9]See *State v Guffey*, 262 SW2d 152 (Mo App, 1953).

Courts and legal scholars have drawn a distinction between two categories of impossibility: "factual impossibility" and "legal impossibility." It has been said that, at common law, legal impossibility is a defense to a charge of attempt, but factual impossibility is not. See American Law Institute, Model Penal Code and Commentaries (1985), comment to § 5.01, pp 307-317; Perkins & Boyce, Criminal Law (3d ed), p 632; Dressler, Understanding Criminal Law (1st ed), § 27.07[B], p 349. However, courts and scholars alike have struggled unsuccessfully over the years to articulate an accurate rule for distinguishing between the categories of "impossibility."

"Factual impossibility," which has apparently never been recognized in any American jurisdiction as a defense to a charge of attempt,[10] exists when [the defendant's] intended end constitutes a crime but she fails to consummate it because of a factual circumstance unknown to her or beyond her control." Dressler, *supra*, § 27.07[C][1], p 350. An example of a "factual impossibility" scenario is where the defendant is prosecuted for attempted murder after pointing an unloaded gun at

---

[10]See *Commonwealth v Henley*, 504 Pa 408, 411; 474 A2d 1115 (1984); *State v Logan*, 232 Kan 646, 648; 656 P2d 777 (1983).

someone and pulling the trigger, where the defendant believed the gun was loaded.[11]

The category of "legal impossibility" is further divided into two subcategories: "pure" legal impossibility and "hybrid" legal impossibility. Although it is generally undisputed that "pure" legal impossibility will bar an attempt conviction, the concept of "hybrid legal impossibility" has proven problematic. As Professor Dressler points out, the failure of courts to distinguish between "pure" and "hybrid" legal impossibility has created confusion in this area of the law. Dressler, *supra*, § 27.07[D][1], p 351.

"*Pure legal impossibility* exists if the criminal law does not prohibit *D*'s conduct or the result that she has sought to achieve." *Id.*, § 27.07[D][2], p 352 (emphasis in original). In other words, the concept of pure legal impossibility applies when an actor engages in conduct that he believes is criminal, but is not actually prohibited by law: "There can be no conviction of criminal attempt based upon D's erroneous notion that he was committing a crime." Perkins & Boyce, *supra*, p 634. As an example, consider the case of a man who believes that the legal age of consent is sixteen years old, and who believes that a girl

---

[11]See *State v Damms*, 9 Wis 2d 183; 100 NW2d 592 (1960).

with whom he had consensual sexual intercourse is fifteen years old. If the law actually fixed the age of consent at fifteen, this man would not be guilty of attempted statutory rape, despite his mistaken belief that the law prohibited his conduct. See Dressler, *supra*, § 27.07[D][2], pp 352-353, n 25.

When courts speak of "legal impossibility," they are generally referring to what is more accurately described as "hybrid" legal impossibility.

> Most claims of legal impossibility are of the hybrid variety. *Hybrid legal impossibility* exists if *D*'s goal was illegal, but commission of the offense was impossible due to a factual mistake by her regarding the legal status of some factor relevant to her conduct. This version of impossibility is a "hybrid" because, as the definition implies and as is clarified immediately below, D's impossibility claim includes both a legal and a factual aspect to it.
>
> Courts have recognized a defense of legal impossibility or have stated that it would exist if D receives unstolen property believing it was stolen; tries to pick the pocket of a stone image of a human; offers a bribe to a "juror" who is not a juror; tries to

hunt deer out of season by shooting a stuffed animal; shoots a corpse believing that it is alive; or shoots at a tree stump believing that it is a human.

Notice that each of the mistakes in these cases affected the legal status of some aspect of the defendant's conduct. The status of property as "stolen" is necessary to commit the crime of "receiving stolen property with knowledge it is stolen"—i.e., a person legally is incapable of committing this offense if the property is not stolen. The status of a person as a "juror" is legally necessary to commit the offense of bribing a juror. The status of a victim as a "human being" (rather than as a corpse, tree stump, or statue) legally is necessary to commit the crime of murder or to "take and carry away the personal property *of another*." Finally, putting a bullet into a stuffed deer can never constitute the crime of hunting out of season.

On the other hand, in each example of hybrid legal impossibility *D* was mistaken about a fact: whether property was stolen, whether a person was a juror, whether the victims were human or whether

> the victim was an animal subject to being hunted out of season. [Dressler, *supra*, § 27.07[D][3][a], pp 353-354 (emphasis in original).]

As the Court of Appeals panel in this case accurately noted, it is possible to view virtually any example of "hybrid legal impossibility" as an example of "factual impossibility":

> "*Ultimately any case of hybrid legal impossibility may reasonably be characterized as factual impossibility*. . . . [B]y skillful characterization, one can describe virtually any case of hybrid legal impossibility, which is a common law defense, as an example of factual impossibility, which is *not* a defense." [241 Mich App 106 (emphasis in original), quoting Dressler, Understanding Criminal Law (2d ed), § 27.07[D][3][a], pp 374-375.]

See also Weiss, *Scope, mistake, and impossibility: The philosophy of language and problems of mens rea*, 83 Colum L R 1029, 1029-1030 (1983) ("[b]ecause ordinary English cannot adequately distinguish among the various kinds of impossible attempts, courts and commentators have frequently misclassified certain types of cases"); *United States v Thomas*, 13 CMA 278, 283; 32 CMR 278, 283 (1962) ("[w]hat is abundantly clear . . . is that it is most difficult to

classify any particular state of facts as positively coming within one of these categories to the exclusion of the other"); *State v Moretti*, 52 NJ 182, 189; 244 A2d 499 (1968) ("[o]ur examination of [authorities discussing the doctrine of impossibility] convinces us that the application of the defense of impossibility is so fraught with intricacies and artificial distinctions that the defense has little value as an analytical method for reaching substantial justice").

It is notable that "the great majority of jurisdictions have now recognized that legal and factual impossibility are 'logically indistinguishable' . . . and have abolished impossibility as a defense." *United States v Hsu*, 155 F3d 189, 199 (CA 3, 1998).[12] For example, several states have adopted statutory provisions similar to Model Penal Code § 5.01(1),[13] which provides:

---

[12]Apart from judicial abrogation of this doctrine, many states have done so by legislative enactment. In a 1995 law review article, California Deputy Attorney General Kyle Brodie listed twenty states that had specifically abolished the defense of impossibility by legislative enactment. Brodie, *The obviously impossible attempt: A proposed revision to the Model Penal Code*, 15 N Ill U L R 237, n 39 (1995).

[13]See, e.g., Kan Stat Ann 21, § 3301; Colo Rev Stat 18-2-101(1); New York Penal Law 110.10.

> A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required - for commission of the crime, he:
>
> (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
>
> (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

In other jurisdictions, courts have considered the "impossibility" defense under attempt statutes that did not include language explicitly abolishing the defense. Several of these courts have simply declined to participate in the sterile academic exercise of categorizing a particular set of facts as representing "factual" or "legal"

impossibility, and have instead examined solely the words of the applicable attempt statute. See *Darnell v State*, 92 Nev 680; 558 P2d 624 (1976); *State v Moretti*, 52 NJ 182, 189; 244 A2d 499 (1968); *People v Rojas*, 55 Cal 2d 252; 358 P2d 921 (1961).

B. Attempted Distribution Of Obscene Material To A Minor.

The Court of Appeals panel in this case, after examining Professor Dressler's exposition of the doctrine of impossibility, concluded that it was legally impossible for defendant to have committed the charged offense of attempted distribution of obscene material to a minor. The panel held that, because "Bekka" was, in fact, an adult, an essential requirement of the underlying substantive offense was not met (dissemination to a minor), and therefore it was legally impossible for defendant to have committed the crime.

We begin by noting that the concept of "impossibility," in either its "factual" or "legal" variant, has never been recognized by this Court as a valid defense to a charge of attempt. In arguing that impossibility is a judicially recognized defense in Michigan, defendant relies heavily on our statement in *People v Tinskey*, 394 Mich 108; 228 NW2d 782 (1975), that

> [i]t is possible, *although we need not decide*, that defendants could not have been convicted of attempted abortion; at common law the general rule is that while factual impossibility is not a defense (*People v Jones*, 46 Mich 441; 9 NW 486 [1881])[14] legal impossibility is a defense. LaFave & Scott, Criminal Law, § 62, p 474. [Emphasis supplied.]

As is readily apparent, our statement in *Tinskey* regarding "legal impossibility" as a defense to an attempt charge is nothing more than obiter dictum. The defendants in *Tinskey* were not charged with attempt; rather, they were charged with statutory conspiracy. Moreover, we *specifically declined* in *Tinskey* to express any opinion regarding the viability of the "impossibility" defense in the context of attempts. No other Michigan Supreme Court case has referenced, much less adopted, the impossibility defense.

---

[14]In *Jones*, this Court, without mentioning the term "impossibility" held that a conviction of attempted larceny could stand notwithstanding that the defendant picked an empty pocket.

Finding no recognition of impossibility in our common law, we turn now to the terms of the statute. MCL 750.92 provides, in relevant part:

> Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:
>
> . . . .
>
> 3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than 5 years, or imprisonment in the county jail or by fine, the offender convicted of such attempt shall be guilty of a misdemeanor. . . .

Under our statute, then, an "attempt" consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense. We have further explained the elements of attempt under our statute as including "an intent to do an

act or to bring about certain consequences which would in law amount to a crime[15] and . . . an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation." *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993), quoting 2 LaFave & Scott, Substantive Criminal Law, § 6.2, p 18.

In determining whether "impossibility," were we to recognize the doctrine, is a viable defense to a charge of attempt under MCL 750.92, our obligation is to examine the statute in an effort to discern and give effect to the legislative intent that may reasonably be inferred from the text of the statute itself. *People v McIntire*, 461 Mich 147, 152-153; 599 NW2d 102 (1999). "When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case." *Id.* at 153 (citation omitted). Accordingly, if our Legislature has indicated its intent to criminalize certain

---

[15]The characterization of "attempt" as a "specific intent" crime is fully consistent with the plain meaning of the word "attempt." See Perkins & Boyce, *supra* at 637 ("[t]he word 'attempt' means to try; it implies an effort to bring about a desired result. Hence an attempt to commit any crime requires a specific intent to commit that particular offense").

conduct despite the actor's mistake of fact, this Court does not have the authority to create and apply a substantive defense based upon the concept of "impossibility." See *People v Glass (After Remand)*, 464 Mich 266; 627 NW2d 261 (2001).

We are unable to discern from the words of the attempt statute any legislative intent that the concept of "impossibility" provide any impediment to charging a defendant with, or convicting him of, an attempted crime, notwithstanding any factual mistake regarding either the attendant circumstances or the legal status of some factor relevant thereto, that he may harbor. The attempt statute carves out no exception for those who, possessing the requisite criminal intent to commit an offense prohibited by law and taking action toward the commission of that offense, have acted under an extrinsic misconception.

Defendant in this case is not charged with the substantive crime of distributing obscene material to a minor in violation of MCL 722.675.[16] It is unquestioned

---

[16]At the time of the alleged offense, MCL 722.675 provided, in relevant part:

> (1) A person is guilty of distributing obscene matter to a minor if that person does either of the following:

that defendant could not be convicted of that crime,

> (a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.
>
> . . . .
>
> (2) A person knowingly disseminates sexually explicit matter to a minor when the person knows both the nature of the matter and the status of the minor to whom the matter is disseminated.
>
> (3) A person knows the nature of matter if the person either is aware of the character and content of the matter or recklessly disregards circumstances suggesting the character and content of the matter.
>
> (4) A person knows the status of a minor if the person either is aware that the person to whom the dissemination is made is under 18 years of age or recklessly disregards a substantial risk that the person to whom the dissemination is made is under 18 years of age.

because defendant allegedly distributed obscene material not to "a minor," but to an adult man. Instead, defendant is charged with the distinct offense of attempt, which requires only that the prosecution prove intention to commit an offense prohibited by law, coupled with conduct toward the commission of that offense. The notion that it would be "impossible" for the defendant to have committed the *completed* offense is simply irrelevant to the analysis. Rather, in deciding guilt on a charge of attempt, the trier of fact must examine the unique circumstances of the particular case and determine whether the prosecution has proven that the defendant possessed the requisite specific intent and that he engaged in some act "towards the commission" of the intended offense.

Because the nonexistence of a minor victim does not give rise to a viable defense to the attempt charge in this case, the circuit court erred in dismissing this charge on the basis of "legal impossibility."

C. Solicitation To Commit Third-Degree Criminal Sexual Conduct.

1. Analysis

Defendant was additionally charged, on the basis of his Internet conversations with "Bekka," with

solicitation to commit third-degree criminal sexual conduct. Defendant maintains that it was "legally impossible" for him to have committed this crime, because the underlying felony requires the existence of a child under the age of sixteen.[17] The Court of Appeals panel agreed, concluding that it was legally impossible for defendant to have committed the crime because the underlying form of third-degree criminal sexual conduct charged, MCL 750.520d(1)(a), required the existence of a person under the age of sixteen. The panel further concluded that it was legally impossible for defendant to have committed the crime for the additional reason that he did not "solicit[] another person to commit a felony" as proscribed by the solicitation statute.

Our solicitation statute, MCL 750.157b, provides as follows, in relevant part:

> (1) For purposes of this section, "solicit" means to offer to give, promise to give, or give any money, services, or

---

[17]MCL 750.520d(1) provides that "[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and . . . (a) [t]hat other person is at least 13 years of age and under 16 years of age."

anything of value, or to forgive or promise to forgive a debt or obligation.

. . . .

(3) . . . [A] person who solicits *another person to commit a felony,* or who solicits *another person to do or omit to do an act which if completed would constitute a felony,* is punishable as follows:

(a) If the offense solicited is a felony punishable by imprisonment for life, or for 5 years or more, the person is guilty of a felony . . . . [Emphasis supplied.]

The Court of Appeals erred to the extent that it relied on the doctrine of "impossibility" as a ground for affirming the circuit court's dismissal of the solicitation charge. As we have explained, Michigan has never adopted the doctrine of impossibility as a defense in its traditional *attempt* context, much less in the context of *solicitation* crimes. Moreover, we are unable to locate any authority, and defendant has provided none, for the

proposition that "impossibility" is a recognized defense to a charge of solicitation in other jurisdictions.[18]

Nevertheless, the solicitation charge was properly dismissed for the reason that there is no evidence that defendant in our case solicited anyone "to commit a felony" or "to do or omit to do an act which if completed would constitute a felony" as prohibited by MCL 750.157b. Pursuant to the plain statutory language, the prosecution was required to present evidence that defendant requested that *another person* perform a criminal act. The evidence here shows only that defendant requested that "Bekka"

---

[18]On the other hand, some courts have had occasion to specifically reject the notion that impossibility is a defense to solicitation. See, e.g., *Benson v Superior Court of Los Angeles Co*, 57 Cal 2d 240, 243-244; 368 P2d 116 (1962) ("[i]f the solicitor believes that the act can be committed 'it is immaterial that the crime urged is not possible of fulfilment at the time when the words are spoken' or becomes impossible at a later time" [citations omitted]). See also Model Penal Code § 5.04(1) (Proposed Official Draft 1985) ("[I]t is immaterial to the liability of a person who solicits or conspires with another to commit a crime that: (b) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime").

engage in sexual acts with him. While the requested acts might well have constituted a crime on defendant's part, "Bekka" (or Liczbinski) would not have committed third-degree criminal sexual conduct had she (or he) done as defendant suggested. As the Court of Appeals properly concluded:

> What is lacking here is defendant's request to another person to commit a crime. "Bekka," the fourteen-year-old online persona of Deputy Liczbinski, was not asked to commit a crime. That is, while it would be a crime for defendant to engage in sexual intercourse with a fourteen-year-old girl, a fourteen-year-old girl is not committing a criminal offense (or at least not CSC-3) by engaging in sexual intercourse with an adult. Thus, whether we look at this case as defendant asking fourteen-year-old "Bekka" to engage in sexual intercourse with him or as defendant asking Deputy Liczbinski to engage in sexual intercourse with him, he did not ask another person to commit CSC-3. . . .
>
> For the above reasons we conclude that the trial court properly dismissed the charge of solicitation to commit criminal sexual conduct. [241 Mich App 111.]

Accordingly, while the concept of "impossibility" has no role in the analysis of this issue, we agree with the panel's conclusion that an element of the statutory offense is missing and that the solicitation charge was therefore properly dismissed.

II. RESPONSE TO THE DISSENT

In his partial dissent, Justice Taylor opines that our construction of MCL 750.157b(3) renders the second phrase of that subsection a "nullity," and that this phrase—"or who solicits another person to do or omit to do an act which if completed would constitute a felony"—should be read to encompass "situations where the solicitee could not be charged with the felony, but the solicitor could be." Slip op, pp 3-4. We disagree.

We first note that, pursuant to the plain language of this phrase, it is the act of "*another person*" that must, if completed, "constitute a felony." We believe that the plain language of the statute does not support the interpretation our dissenting colleague gives it.

Moreover, our construction of § 157b(3) does not render the second phrase of that subsection "nugatory" or "surplusage." Rather, it appears that the Legislature, by its use of the phrase "do or omit to do an act which if completed would constitute a felony," intended to make

clear that the solicited offense does not have to be completed.

It is noteworthy that § 157b was substantially amended in 1986, following this Court's holding in *People v Rehkopf*, 422 Mich 198; 370 NW2d 296 (1985). In *Rehkopf*, this Court examined two cases in which the defendants were charged under the former version of § 157b. Defendant Rehkopf had asked an undercover police officer to kill her husband, and defendant Snyder had asked someone to kill his brother. In neither case did the intended murder ever occur. This Court held that the statute was not violated where the defendants' conduct did not lead to the results the defendants urged – namely, the deaths of Rehkopf's husband or Snyder's brother.

In 1985, the statute read as follows, in pertinent part:

> Any person who incites, induces or exhorts any other person to . . . do any act which would constitute a felony . . . shall be punished in the same manner as if he had committed the offense incited, induced or exhorted.

The *Rehkopf* majority held that

> § 157b does not subject a person to criminal responsibility for utterances that do not result in the commission of the offense sought to be committed. A person who does no more than utter words seeking the commission of an offense is subject to liability only for the common-law offense of solicitation. [*Id.* at 205.][19]

Justice Boyle and Chief Justice Williams dissented, opining that § 157b contained no requirement "that the solicitation result in either actual incitement or completion of the solicited offense." *Id.* at 223.

In 1986, the Legislature rewrote § 157b. The first clause of current subsection 157b(3) ("a person who solicits another person to commit a felony"), apart from using the term "solicits," is quite similar to the phrase "[a]ny person who incites, induces or exhorts any other person to do any act which would constitute a felony" as used in the prior version of § 157b. However, the Legislature apparently deemed it necessary – reasonably so, in light of the *Rehkopf*

---

[19]This Court pointed out that "[s]olicitation remains a common-law offense in Michigan for which a maximum of five years imprisonment and a $10,000 fine may be imposed" pursuant to MCL 750.505. 422 Mich 204, n3.

Court's construction of § 157b—to clarify that the solicited act need not be completed in order to satisfy the elements of the statute. Accordingly, the second clause of subsection 157b(3) provides further that the statute is violated where the defendant "solicits another person to do or omit to do an act which *if completed* would constitute a felony" (emphasis supplied). It is quite probable that the Legislature believed that the phrase "solicits another person to commit a felony" would not have reached solicitations in which the solicited act never came to fruition, and that the second clause was added for this purpose.

III. CONCLUSION

This Court has never recognized the doctrine of impossibility. Moreover, we are unable to discern any legislative intent that the doctrine may be advanced as a defense to a charge of attempt under MCL 750.92. Accordingly, the circuit court erred in dismissing this charge on the basis that it was "legally impossible" for defendant to have committed the crime.

Furthermore, although we do not agree with the circuit court or the Court of Appeals that "legal impossibility" was properly invoked by defendant as a defense to the charge of solicitation, we nevertheless affirm the dismissal of this charge. There is no evidence that defendant solicited anyone "to commit a felony" or "to

do or omit to do an act which if completed would constitute a felony."

Accordingly, we reverse in part, affirm in part, and remand this matter to the circuit court for proceedings consistent with this opinion. We do not retain jurisdiction.

CORRIGAN, C.J., and WEAVER and MARKMAN, JJ., concurred with YOUNG, J.

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v. No. 116967

CHRISTOPHER THOUSAND,

Defendant-Appellee.

KELLY, J. (*concurring in part and dissenting in part*).

I respectfully disagree with the majority's conclusion that the doctrine of "legal impossibility" has never been adopted in Michigan. There is ample evidence to the contrary in the case law of the state. Because "legal impossibility" is a viable defense, I would affirm the Court of Appeals decision affirming the circuit court's dismissal of attempted distribution of obscene material to a minor. MCL 750.92, 722.675.

I would also find that legal impossibility, while a viable defense to solicitation, is inapplicable to the charge of solicitation to commit third-degree criminal sexual

conduct in this case. MCL 750.157b(3)(a), 750.520d(1)(a). I agree with the majority's conclusion that there is no evidence that defendant solicited anyone to commit CSC-3. Therefore, I would affirm the Court of Appeals decision affirming the circuit court's dismissal of the solicitation charge, but on different grounds.

I. "LEGAL IMPOSSIBILITY" IN MICHIGAN

The majority errs in concluding that "legal impossibility" has never been adopted in Michigan. It focuses on language in *Tinskey*[1] pertaining to "legal impossibility" as a defense to attempt, but ignores the reasoning of the decision. Viewing the forest as well as the trees, one observes that the reasoning and the conclusion of the *Tinskey* Court prove that it accepted the doctrine of "legal impossibility."

Tinskey held that the defendants could not be guilty of conspiracy to commit abortion because the woman who was to be aborted was not pregnant. *Tinskey, supra* at 109. The Court reasoned that the Legislature, in enacting the statute, purposely required that conspiracy to abort involve a pregnant woman. It thereby rejected prosecutions where the woman was not pregnant. It

---

[1] *People v Tinsky*, 394 Mich 108; 228 NW2d 782 (1975).

concluded that the defendants in *Tinskey* could not be prosecuted for conspiracy to commit abortion because one of the elements of the crime, a pregnant woman, could not be established.

Significantly, the *Tinskey* Court stated that "[t]he Legislature has not, as to most other offenses, so similarly indicated that impossibility is not a defense." *Id.*[2] By this language, *Tinskey* expressly recognized the existence of the "legal impossibility" defense in the common law of this state. Even though the reference to "legal impossibility" regarding the crime of attempt may be dictum, the later statement regarding the "impossibility" defense was part of the reasoning and conclusion in *Tinskey*. This Court recognized the defense, even if it did not do so expressly concerning charges for attempt or solicitation.

---

[2]I take this to mean that with respect to conspiracy to abort, as with most other statutory crimes, the Legislature has not indicated that impossibility is not a defense. Hence, it *is* a defense.

Moreover, Michigan common law[3] is not limited to decisions from this Court. The majority should not ignore decisions from the Court of Appeals. That Court has accepted "legal impossibility" as a defense.

For example, in *People v Ng*, the Court of Appeals distinguished between "factual impossibility" and "legal impossibility" in rejecting a defendant's argument that he was not guilty of attempted murder. 156 Mich App 779, 786; 402 NW2d 500 (1986). It found that factual impossibility is not a defense to a charge of attempted murder, but observed that legal impossibility *is* a defense, citing *Tinskey*. Similarly, in *People v Cain*, the court distinguished between "legal impossibility" and a defense based on a claim of right. 238 Mich App 95, 117-119; 605 NW2d 28 (1999). It implicitly read *Tinskey* as acknowledging the existence of the "legal impossibility"

---

[3]Common law is "the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs . . . . In general, it is a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments." Black's Law Dictionary (6th ed), p 276.

defense.[4] Accordingly, in this case, the Court of Appeals correctly considered "legal impossibility" a viable defense.

II. INTERPRETATION OF THE ATTEMPT STATUTE

Even if "legal impossibility" were not part of Michigan's common law, I would disagree with the majority's interpretation of the attempt statute. It does not follow from the fact that the statute does not expressly incorporate the concept of impossibility that the defense is inapplicable.

Examination of the language of the attempt statute leads to a reasonable inference that the Legislature did not intend to punish conduct that a mistake of legal fact renders unprohibited. The attempt statute makes illegal an ". . . attempt to *commit an offense prohibited by law* . . . ." MCL 750.92 (emphasis added). It does not make illegal an action not prohibited by law. Hence, one may conclude,

---

[4]See also *People v Genoa*, 188 Mich App 461, 464; 470 NW2d 447 (1991). *Genoa* held that the circuit court correctly dismissed the charge of attempted possession with intent to deliver 650 grams or more of cocaine. Judge Shepherd based the holding on the fact that it was legally impossible for the defendant to have committed the offense.

the impossibility of completing the underlying crime can provide a defense to attempt.

This reasoning is supported by the fact that the attempt statute codified the common-law rule regarding the elements of attempt. See *People v Youngs*, 122 Mich 292, 293; 81 NW 114 (1899); People *v Webb*, 127 Mich 29, 31-32; 86 NW 406 (1901). At common law, "legal impossibility" is a defense to attempt. *United States v Hsu*, 155 F3d 189, 199-200 (CA 3, 1998); Dressler, Understanding Criminal Law (2d ed), § 27.07[B], p 369; 21 Am Jur 2d, Criminal Law, § 178, p 254. Absent a statute expressly abrogating "legal impossibility," this common-law rule continues to provide a viable defense. *Bandfield v Bandfield*, 117 Mich 80, 82; 75 NW 287 (1898), rev'd in part on other grounds *Hosko v Hosko*, 385 Mich 39; 187 NW2d 236 (1971).[5]

This state's attempt statute, unlike the Model Penal Code and various state statutes that follow it, does not contain language allowing for consideration of a defendant's beliefs regarding "attendant circumstances."

---

[5]The *Bandfield* Court stated: "The legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law. Courts should not be left to construction to sustain such bold innovations." *Id.* at 82.

Rather, it takes an "objective" view of criminality, focusing on whether the defendant actually came close to completing the prohibited act. 1 Robinson, Criminal Law Defenses, § 85(a), pp 423-424; § 85(b), p 426, n 22. The impossibility of completing the offense is relevant to this objective approach because impossibility obviates the state's "concern that the actor may cause or come close to causing the harm or evil that the offense seeks to prevent." *Id.* at 424.

The majority's conclusion, that it is irrelevant whether it would be impossible to have committed the completed offense, contradicts the language used in the attempt statute. If an element of the offense cannot be established, an accused cannot be found guilty of the prohibited act. The underlying offense in this case, disseminating or exhibiting sexual material to a minor, requires a minor recipient. Because the dissemination was not to a minor, it is legally impossible for defendant to have committed the prohibited act.

This Court should affirm the Court of Appeals decision, determining that it was legally impossible for defendant to have committed the charged offense of attempted distribution of obscene material to a minor, MCL 750.92, 722.675.

III. THE SOLICITATION STATUTE

I further disagree with the majority's conclusion that "legal impossibility" is not a recognized defense to a solicitation charge. As discussed above, the defense has been implicitly acknowledged in Michigan's case law. The majority states that no authority supports the proposition that "legal impossibility" is a defense to solicitation in other jurisdictions. However, this fact is unremarkable in light of the rarity with which the defense is invoked. Moreover, "the impossibility issue can arise in all inchoate offenses," including solicitation. Robinson, § 85(f)(2), p 436.

The language of our solicitation statute demonstrates that an illegal solicitation must concern an act that would constitute a felony if completed. The statute states, "a person who solicits another person to commit a felony, or who solicits another person to do or omit to do an act which if completed would constitute a felony, is punishable as follows . . . ." MCL 750.157b(3).

"Legal impossibility" would be a defense if the defendant's goal were illegal but the offense incomplete due to the defendant's factual mistake concerning the legal status of a relevant circumstance. See Dressler, § 27.07[D][3][a], p 373 (discussing "hybrid legal impossibility"). In this case, defendant was mistaken regarding the legal status of "Bekka," whom he believed to be a female minor but who was actually a male adult.

However, defendant's factual mistake is irrelevant in analyzing the charge of solicitation to commit third-degree criminal sexual conduct. Even if he had made his request to engage in sexual intercourse to a fourteen-year-old girl, defendant, not the girl, would have violated the CSC-3 statute. Therefore, I agree with the majority that defendant did not solicit "Bekka" to commit an act that constituted a felony within the meaning of the solicitation statute.

I note that this is the same conclusion reached by the Court of Appeals. See *People v Thousand*, 241 Mich App 102, 111; 614 NW2d 674 (2000). That Court erred, however, in applying a-"legal impossibility" analysis. It was not defendant's mistake regarding the minority status of "Bekka" that is significant. Rather, an element of the solicitation charge is missing. "Legal impossibility" is, therefore, irrelevant under the facts of this case. The solicitation charge was properly dismissed because the prosecution could not prove all elements of the crime.

IV. CONCLUSION

As judges, we often decide cases involving disturbing facts. However repugnant we personally find the criminal conduct charged, we must decide the issues on the basis of the law. I certainly do not wish to have child predators loose in society. However, I believe that neither the law nor society is served by allowing the end

of removing them from society to excuse unjust means to accomplish it. In this case, defendant raised a legal impossibility argument that is supported by Michigan case law. The majority, in determining that legal impossibility is not a viable defense in this state, ignores that law.

In keeping with precedent and legal authority, I would affirm the Court of Appeals decision that it was legally impossible for defendant to commit the charged offense of attempted distribution of obscene material to a minor. Of course, if this view prevailed, defendant could still be prosecuted for his alleged misconduct. He is to be tried on the most serious of the charges, child sexually abusive activity, MCL 750.145c.

With regard to the solicitation charge, I disagree with the majority's conclusion that "legal impossibility" is not a defense to solicitation. However, the defense does not apply under the facts of this case. Even if the facts had been as defendant believed, defendant did not solicit "Bekka" to commit CSC-3. Hence, an essential element of the solicitation charge is missing. The charge was properly dismissed for that reason, not because of the availability of the "legal impossibility" defense.
CAVANAGH, J., concurred with KELLY, J.

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/
Cross-Appellee,

v. No. 116967

CHRISTOPHER THOUSAND,

Defendant-Appellee/
Cross-Appellant.

TAYLOR, J. (*concurring in part and dissenting in part*).

I agree with the majority's recitation of the facts and its excellent analysis of why "hybrid legal impossibility" should not be recognized as a defense to a charge of attempt under MCL 750.92. Thus, I concur with parts I, II, III(A), and III(B) of the majority opinion.

However, I respectfully dissent from the majority's analysis of the solicitation of third-degree criminal sexual conduct (CSC 3) charge in part III(C). In my view, defendant may be charged with solicitation on the basis of

the evidence that he solicited a person whom he believed to be a fourteen-year-old child to engage in an act of sexual penetration even though a child victim of such an act of CSC 3 would not be guilty of CSC 3 for "voluntarily" engaging in the act.

My difference with the majority is in its understanding of the solicitation statute, MCL 750.157b(3). That section provides in pertinent part:

> [A] person who solicits another person to commit a felony, *or who solicits another person to do or omit to do an act which if completed would constitute a felony,* is punishable as follows: . . . . [Emphasis added.]

As to the first clause ("a person who solicits another person to commit a felony"), I agree with the majority that defendant cannot be considered to have asked "Bekka" to *commit* the felony of CSC 3 in violation of the solicitation statute because she cannot commit this felony by engaging in sex with an adult. If an adult and a child aged thirteen to fifteen engage in an act of "consensual" sexual penetration, only the adult would be committing the crime of CSC 3.[1] Thus, an adult who asks a fourteen-year-old

---

[1]The CSC3 statute provides, in pertinent part, that "[a] person is guilty of [CSC 3] if the person engages in

child to engage in such an act cannot be considered to have asked the child to commit CSC 3. That is, the solicitor has not breached the first clause in this section.

However, regarding the disjunctive clause that follows the first clause, i.e., "or who solicits another person to do or omit to do an act which if completed would constitute a felony," this language is broader in scope than merely prohibiting a person from soliciting another person to commit a felony. I believe this language makes it unlawful to solicit another person to do an act that if the act were completed would be a felony. While this part of the statute surely is not as clear as it could be,[2] we must use statutory construction rules to give it meaning. A

---

sexual penetration with another person and . . . [t]hat other person is at least 13 years of age and under 16 years of age." MCL 750.520d(1)(a). As one would expect, this language is phrased so as to impose criminal liability on an adult who engages in sexual penetration with a child aged thirteen to fifteen without imposing liability on the child victim of the crime.

[2]Perhaps the Legislature will want to consider revising the solicitation statute to employ more straightforward language in place of the phrase "to do or omit to do an act which if completed would constitute a felony."

primary rule is that we should avoid making the second clause a nullity by giving it the same meaning as the first clause.[3] Using this tool, I conclude that the second clause means it is unlawful to solicit another person to join with the solicitor in doing an act that would constitute a felony whether the solicited party could be guilty of the felony or not.

This all means that the first clause requires that the solicited act would be a felony for which the solicitee could be charged. The second clause encompasses situations where the solicitee could not be charged with the felony, but the solicitor could be. This construction of the statute gives viability to both clauses of the section at issue and is, thus, in my view, not only preferable, but required.

---

[3]"It is a maxim of statutory construction that every word of a statute should be read in a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory." *In re MCI Telecommunications Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999); see also *People v Warren*, 462 Mich 415, 429, n 24; 615 NW2d 691 (2000) (no word of a statute should be treated as surplusage or rendered nugatory).

The gist of the majority opinion, with regard to the solicitation issue, is that the second phrase, i.e., "or who solicits another person to do or omit to do an act which if completed would constitute a felony," is merely clarifying language to make clear that the Legislature did not intend to require that the solicitee actually complete the solicited felony in order for the solicitor to have violated the statute. That is, the majority states that the second clause was "intended to make clear that the solicited offense does not have to be completed." Slip op, p 23. Yet, the majority seems to acknowledge that the first clause is also violated by a solicitation to commit a felony even if the felony is never actually completed. This, then, makes the second clause a nullity. It is that outcome that disciplined readers of statutes should avoid.

Also, the majority indicates that my interpretation is contrary to the plain language of the statute because "it is the act of 'another person' that must, if completed, 'constitute a felony.'" Slip op, p 23. I disagree because the majority's view on this point fails to give meaning to the words "if completed." If, as the majority argues, the conduct of the solicitee in itself must constitute a felony, then the language of the second phrase has no different meaning than if it simply referred to "an act which . . . would constitute a felony." The reason is that, if the statutory language read "or who solicits another person to do or omit to do an act which would constitute a felony," then it might well be argued that the solicited person's

contemplated "act," standing alone, must constitute a felony for the statute to be violated. However, the "if completed" language allows for the imposition of liability where completion of the solicited act by another person would necessarily constitute a felony.

I agree with the majority that the current language of the solicitation statute, MCL 750.157b, seems to be in large measure a reaction to this Court's interpretation of the preceding statutory language at issue in *People v Rehkopf*, 422 Mich 198; 370 NW2d 296 (1985). However, that means only that the Legislature intended to include circumstances in which the solicited felony is never actually committed within the scope of the solicitation statute. Indeed, the language of the first clause proscribing a person from merely asking another person "to commit a felony" suffices, by its plain and unambiguous meaning, to accomplish that goal. That does not mean, however, that the Legislature might not have wanted to cover more situations inasmuch as it was acting to broaden the scope of the statute. Accordingly, the discussion of *Rehkopf* does not alter my view that, in keeping with the canon of construction against rendering statutory language nugatory or surplusage, the second clause must be taken as encompassing more than the first clause, standing alone, does.

Turning to the circumstances of the present case, there was evidence that defendant solicited "Bekka,"

believing "her" to be a fourteen-year-old child, to engage in an act of sexual penetration with him. In other words, defendant solicited "Bekka" to engage with him in an act of sexual penetration between an adult and a fourteen-year-old child. Thus, defendant solicited "Bekka" to do an act that, "if completed" by the participation of defendant, would constitute the felony of CSC 3 on defendant's part. Accordingly, I conclude that such a solicitation falls within the range of conduct in the solicitation statute's prohibition of soliciting another person "to do . . . an act which if completed would constitute a felony." MCL 750.157b(3).

Of course, I recognize that because "Bekka" was actually Deputy William Liczbinski, an adult, the solicited person could not actually have committed the act envisioned by defendant. However, that is immaterial. There is nothing in the language of the pertinent part of the solicitation statute, MCL 750.157b(3), that requires that it be possible for the solicited person to carry out the conduct that is solicited in order for the statute to be violated. Thus, consistent with the majority opinion's rejection of the "legal impossibility" defense, I conclude that it is immaterial that the deputy could not have carried out the solicited act.

Accordingly, I agree with the majority's treatment of the attempted distribution of obscene material to a minor charge. However, I would also reverse the Court of

Appeals with regard to the solicitation of CSC 3 charge, and would remand to the circuit court for trial on that charge.

People v Thousand

Jennifer M. Granholm, Attorney General, *Thomas L. Casey*, Solicitor General, *Michael E. Duggan*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training and Appeals [1441 St. Antoine, Detroit, MI 48226] [(313) 224-5792], for the people.

David E. Fregolle [20755 Greenfield, Ste. 604, Southfield, MI 48075] [(248) 569-0888] for the defendant-appellee.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
9:05 a.m.

Plaintiff-Appellant,

v.

CHRISTOPHER THOUSAND,

Defendant-Appellee.

FOR PUBLICATION
May 12, 2000

No. 220283

Wayne Circuit Court

LC No. 99-000798

Before: CAVANAGH, P.J., and SAWYER and ZAHRA, JJ.

SAWYER, J.

Defendant was charged with child sexually abusive activity, MCL 750.145c; MSA 28.342a, solicitation to commit third-degree criminal sexual conduct, MCL 750.157b(3)(a); MSA 28.354(2)(3)(a) and MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), and attempted distribution of obscene material to a minor, MCL 750.92; MSA 28.287 and MCL 722.675; MSA 25.254(5). The trial court granted defendant's motion to quash and dismissed

the case. The people now appeal and we affirm in part and reverse in part.

In December 1998, during an undercover investigation of persons using the Internet to attempt to engage in child sexually abusive activity, Wayne County Sheriff's Deputy William Liczbinski, an adult, entered Internet chat rooms and posed as a minor. While in a chat room, Deputy Liczbinski, posing as a fourteen-year-old girl named "Bekka," began chatting with defendant. During their correspondence, defendant made sexual comments to "Bekka," and sent "her" a picture of his penis via the Internet. Defendant told "Bekka" that he was going to "take [her] back to his home into his bedroom where we can be alone and not be bothered for sexual activity." Defendant and "Bekka" decided to meet at the McDonald's Restaurant located on Van Dyke in the City of Detroit. Defendant told "Bekka" that he would be driving a green Duster, what clothing he would be wearing for the meeting, and that he would be carrying a gift for her, a white teddy bear. When he arrived at the meeting site at the predetermined time, defendant was arrested by sheriff's deputies. Two white teddy bears were found in defendant's car.

Defendant moved to quash the information and dismiss the case, arguing that each of the charged offenses required the existence of a minor as the victim or potential victim and that it was undisputed that no minor was

actually involved in this matter. The trial court agreed with defendant and granted the motion to quash. The trial court reasoned that the existence of a minor was an element of each offense with which defendant was charged and, because no such minor was involved, it was legally impossible for defendant to have committed or have attempted to commit the charged offenses.

Plaintiff's only argument involves whether it is legally or factually impossible for defendant to have committed the charged offenses where the victim was not, in fact, a fourteen-year-old girl as defendant thought, but in fact an adult male. This distinction is critical because, while legal impossibility is a defense to the crime of attempt, factual impossibility is not. *People v. Ng*, 156 Mich. App. 779, 786; 402 N.W.2d 500 (1986); *see also People v. Tinskey*, 394 Mich. 108; 228 N.W.2d 782 (1975); *People v. Cain*, 23 8 Mich. App. 95, 117-118; 605 N.W.2d 28 (1999). Although this is the only issue raised by plaintiff, we believe that the analysis differs with each of the three charged offenses. Accordingly, we will analyze each offense separately.

To begin, the issue of factual versus legal impossibility presents a question not unlike the ancient quandary of whether a glass is half empty or half full. As Dressler states in *Understanding Criminal Law*, § 27.07[D][3][a], pp. 374-375 (2d ed.), the distinction can be very subtle:

> *Ultimately any case of hybrid legal impossibility may reasonably be characterized as factual impossibility.* That is, applying the definition of "factual impossibility" set out above in subsection [C][1], in each case *D*'s intended end (e.g., to receive stolen property; to pick a human pocket; to bribe a juror; to kill a human; to hunt a deer out of season) constituted a crime, but she failed to consummate the offense because of some fact of which *D* was unaware or was beyond her control. Thus, by skillful characterization, one can describe virtually any case of hybrid legal impossibility, which is a common law defense, as an example of factual impossibility, which is *not* a defense. [Emphasis in original.]

Professor Dressler summarizes factual impossibility, *id.*, at § 27.07[C][1], p. 370, as follows:

> "Factual impossibility" exists when a person's intended end constitutes a crime, but she fails to consummate the offense because of an attendant circumstance unknown to her or beyond her control. Examples of factual impossibility are: (1) a pickpocket putting her hand in the victim's empty pocket; (2) an abortionist beginning

the surgical procedure on a nonpregnant woman; (3) an impotent male trying to have nonconsensual sexual intercourse; (4) an assailant shooting into an empty bed where the intended victim customarily sleeps, or pulling the trigger of an unloaded gun aimed at a person who is present.

In each of these examples the actor was mistaken regarding some fact relating to the victim, herself or himself and/or the method of commission. More specifically, the target offense was not consummated because the actor chose the wrong victim (the pickpocket and abortion cases), the victim was not present (the empty bed case), the actor was not physically capable of committing the offense (the impotency case), or inappropriate means were used to commit the crime (the unloaded gun case). Had the circumstances been as the actors believed them to be, or hoped that they were (e.g., the pocket contained property; the woman was pregnant; the victim was in the bed; the actor was physically capable of having intercourse; the gun was loaded), the crimes would have been consummated.
It should not be surprising that lawmakers are unsympathetic to claims of factual

> impossibility. In each of the cases described above, the actor has demonstrated her or his dangerousness (critical to subjectivists) and manifested criminality (important to objectivists). No good reason exists to recognize a defense merely because a person chooses her victim badly, does not use proper means to commit the crime, or for some other reason unrelated to her culpability does not successfully commit the offense.

Dressler summarizes legal impossibility as follows, *id.* at § 27.07[D][3][a], pp. 373-374:

> Hybrid legal impossibility (or what courts will simply call "legal impossibility") exists if the actor's goal is illegal (thus, distinguishing itself from pure legal impossibility), but commission of the offense is impossible due to a *factual* mistake by her regarding the *legal* status of some attendant circumstance relevant to her conduct. As the preceding definition implies and as is clarified immediately below, this is a hybrid version of impossibility: the actor's impossibility claim includes both legal and factual aspects to it.

Courts have recognized a defense of legal impossibility or have stated that it would exist if *D*: (1) receives *un*stolen property believing that it was stolen; (2) tries to pick the pocket of a stone image of a human; (3) offers a bribe to a "juror" who is not a juror; (4) tries to hunt deer out of season by shooting a stuffed animal; (5) shoots a corpse believing that it is alive; or (6) shoots at a tree stump believing that it is a human.

Notice that each of the mistakes in these cases affected the legal status of some aspect of the defendant's conduct. A person is not guilty of "receiving stolen property with knowledge that it is stolen" unless the property is "stolen" in character. Likewise, one cannot legally bribe a juror unless the person bribed is a juror. The status of a victim as a "human being," rather than as a corpse, tree stump, or statue, legally is necessary to commit the crime of murder or to "take and carry away the personal property *of another*." Finally, putting a bullet into a stuffed deer cannot legally constitute the crime of killing a deer out of season.

> On the other hand, in each of the preceding examples of hybrid legal impossibility, *D* was mistaken about a fact: whether the property had been stolen; whether a person was a juror; whether the victims were living human beings; or whether the victim was an animal subject to being hunted out of season. [Emphasis in original.]

This brings us back to the original point from Professor Dressler that we quoted: cases may be reasonably characterized as either factually or legally impossible. One distinction we do note between Dressler's examples of legal and factual impossibility is this: in the legal impossibility cases, the intended object of the defendant's actus reus could *not* possibly support the crime, while in the factual impossibility cases the object of the actus reus *could* have been the victim of a crime.

Taking the examples of legal impossibility, the property the defendant intended to receive was not, in fact, stolen and therefore could not form the basis of receiving stolen property; the intended victim of the pickpocket was, in fact, a stone statue, which cannot be the victim of a theft; the person the defendant intended to give money to was not a juror, and therefore could not be a bribed juror; the defendant intended, in fact, to shoot the object which turned out to be a stuffed deer and a stuffed

deer cannot be taken out of season; the defendant intended to shoot the object which was, in fact, a corpse or the object which was, in fact, a tree stump and neither a corpse nor a tree stump may be the victim of a homicide. In each of these cases, the defendant accomplished the actual act he set out to do. He received the property he intended to receive, he picked the pocket he intended to pick, he gave money to the person to whom he intended to give the money, and he shot the object he intended to shoot. While upon learning the full facts of the situation, the defendant may be disappointed in the results, he nevertheless committed the act he intended to commit.

Turning to the examples of factual impossibility, if the victim's pocket had had a wallet, the victim would have suffered a theft; if the woman were pregnant, there would have been an abortion; if the defendant had not been impotent, the victim would have been raped; if the victim had been in the location where the defendant shot, or if the gun had been loaded, the victim would have suffered the wound. In each of these cases, the defendant did *not* accomplish the intended task. He did not remove anything from the victim's pocket, he did not abort the fetus, he failed to have intercourse with the victim, and failed to shoot the victim.

Turning then to the case at bar, we believe that defendant's conduct with respect to two of the charges represents legal impossibility and, therefore, the trial court

properly dismissed the charges. However, with respect to one of the charges, we believe the trial court improperly dismissed the charge.

First, we consider the offense of solicitation of criminal sexual conduct in the third degree. MCL 750.157b(3)(a); MSA 28.354(2)(3)(a) and MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). The form of CSC-3 charged is engaging in sexual penetration with a person under the age of sixteen.[1] We believe that this represents a case of legal impossibility from both the solicitation aspect and the CSC-3 aspect. First, with respect to the CSC-3 element, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a) requires that the defendant engage in sexual penetration with a victim who is at least thirteen years of age and under sixteen. While defendant desired to engage in sexual activity with a fourteen-year-old girl, the actual object of his desire was, in fact, an adult male, Deputy Liczbinski. The person to whom defendant actually made the offer of sexual relations was over the age of sixteen. If defendant had actually engaged in sexual penetration with the person to whom he made the offer (Deputy

---

[1]Plaintiff argued below that the existence of a minor was not an essential element to this count. While it is true that, in general terms, the victim of CSC-3 need not be a minor, a minor victim is essential to specific provisions of the CSC-3 statute alleged in this case.

Liczbinski), he would not have violated MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). It is similar to the poaching the stuffed deer case. Just as it is not poaching to shoot a stuffed deer, it is not a violation of MCL 750.520d(1)(a); MSA 28.788(4)(1)(a) to engage in consensual sexual intercourse with an adult.

Turning to the issue of solicitation, MCL 750.157b; MSA 28.354(2) provides in pertinent part as follows:

> (1) For purposes of this section, "solicit" means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation.
>
> . . . .
>
> (3) Except as provided in subsection (2), a person who solicits another person to commit a felony, or who solicits another person to do or omit to do an act which if completed would constitute a felony, is punishable as follows[.]

What is lacking here is defendant's request to another person to commit a crime. "Bekka," the fourteen-year-old female online persona of Deputy Liczbinski, was not asked to commit a crime. That is, while it would be a

crime for defendant to engage in sexual intercourse with a fourteen-year-old girl, a fourteen-year-old girl is not committing a criminal offense (or at least not CSC-3) by engaging in sexual intercourse with an adult. Thus, whether we look at this case as defendant asking fourteen-year-old "Bekka" to engage in sexual intercourse with him or as defendant asking Deputy Liczbinski to engage in sexual intercourse with him, he did not ask another person to commit CSC-3. That is, it is legally impossible for a person to violate MCL 750.520d(1)(a); MSA 28.788(4)(1)(a) by engaging in sexual intercourse with defendant.

For the above reasons, we conclude that the trial court properly dismissed the charge of solicitation to commit criminal sexual conduct.

Turning next to the charge of attempted disseminating or exhibiting sexual material to a minor, we again find the crime to be legally impossible under the facts of this case. MCL 722.675(1); MSA 25.254(5)(1) provides as follows:

> A person is guilty of distributing obscene matter to a minor if that person does either of the following:
>
> (a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.

> (b) Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors.

Further, MCL 722.671(c); MSA 25.254(1)(c) defines "minor" as a person under eighteen years of age.

Defendant's conduct at issue is the e-mailing of a picture of his penis to "Bekka." Thus, while defendant believed he was sending the picture to a fourteen-year-old girl named Bekka, he in fact was sending it to an adult male named Deputy Liczbinski. We believe that this, too, falls within the area of legal, rather than factual, impossibility. The e-mail was sent to its intended recipient: a person whose chat-room screen name was "Bekka." Because "Bekka" was, in fact, an adult, an essential requirement of the statute was not met: dissemination to a minor.

In fact, this case is very similar to an example of legal impossibility used by Professor Dressler. Dressler, *supra* at § 27.07[A], p. 369, posed the question of two cases. In each case, the male defendant had sexual intercourse with a seventeen-year-old female in a jurisdiction where the age of consent was sixteen. Therefore, statutory rape did not occur in either case. However, the first defendant erroneously believed the girl was fifteen and, therefore, believed (erroneously) that he had committed statutory rape. The second defendant,

on the other hand, knew the girl was seventeen, but erroneously believed the age of consent was eighteen, thus also incorrectly thinking that he had committed statutory rape. Thereafter, Professor Dressler points out that the second defendant is not guilty of a crime because it is not a crime to commit an act which a person erroneously believes is against the law (called "pure legal impossibility"). Dressler, *supra* at § 27.07[D][2], p. 373, n.144. Professor Dressler then goes on to point out that the first defendant also is not guilty of statutory rape under a legal impossibility analysis:

> Consider, as well, the hypothetical in subsection [A], *supra*, in which *D1* has intercourse with a female old enough to consent, although he believed that she was underage. This examples involves hybrid legal impossibility: *D1* was mistaken about a fact (the girl's age); but her age is of legal significance in that sexual intercourse with a 17-year-old female (her true age) does not constitute statutory rape. [*Id.* at § 27.07[D][3][a], p. 374, n.152.]

The exact same circumstance exists here: defendant was mistaken about "Bekka's" age, but Bekka's age is of legal significance in that distributing sexually

explicit material to an adult does not violate the statute defendant is charged under.[2]

Therefore, for the above reasons, we conclude that it is legally impossible to violate MCL 722.675(1); MSA 25.254(5)(1) by distributing obscene material to an adult and, therefore, it does not constitute an attempted violation of that statute to distribute obscene material to a person the defendant believes is a minor, but who is, in fact, an adult. Accordingly, the trial court properly dismissed this charge.

Finally, we turn to the most serious charge against defendant, child sexually abusive activity. MCL 750.145c; MSA 28.342a provides in pertinent part as follows:

> (1) As used in this section:
>
> (a) "Child" means a person who is less than 18 years of age . . . .
>
> . . . .

---

[2]Defendant was also mistaken about "Bekka's " sex, but it is not legally significant whether Bekka was a male or a female.

(e) "Listed sexual act" means sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.

. . . .

(h) "Child sexually abusive activity" means a child engaging in a listed sexual act.

. . . .

(2) A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, or *a person who* attempts or *prepares* or conspires *to arrange for*, produce, make, or finance *any child sexually abusive activity* or child sexually abusive material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the

child is a child, or that person has not taken reasonable precautions to determine the age of the child. [Emphasis added.]

If the child sexually abusive activity statute merely punished actually engaging in child sexually abusive activity and, therefore, defendant was charged with attempted child sexually abusive activity, we would likely have to conclude that this again presented a case of legal impossibility. It would present the same case as distributing obscene material to a minor: the existence of a minor is legally significant and the fact that the intended recipient turned out to be an adult renders it legally impossible to have committed the crime. Similarly, it would be legally impossible to engage in child sexually abusive activity if the individual with whom the defendant intends to engage in such activity is not, in fact, a child.

However, the child sexually abusive activity statute is not so narrowly drawn. As the portion of the statute emphasized above indicates, a person may violate the statute by *preparing* for any child sexually abusive activity. It is, of course, ultimately for the jury to decide if the conduct defendant proposed to "Bekka" constituted child sexually abusive activity and whether defendant did, in fact, prepare to engage in such activity. That is, we are not called upon in this case to determine whether

defendant would be guilty of the charged offense if, in fact, "Bekka" had been a fourteen-year-old girl.

Our analysis assumes, without deciding, that defendant would, in fact, be guilty of child sexually abusive activity if "Bekka" had been a fourteen-year-old girl as defendant thought rather than the adult male that Deputy Liczbinski really is. The question before us is whether it makes a difference to the issue of defendant's guilt that "Bekka" is, in fact, an adult rather than a fourteen-year-old girl. We conclude that it does not.

Because the child sexually abusive activity statute only requires mere preparation, rather than actual abusive activity, we are satisfied that a situation such as the case at bar comes within the provision of the statute. Black's Law Dictionary (5th ed.), pp. 1063-1064, defines "preparation" as follows:

> With respect to criminal offense, consists in devising or arranging means or measures necessary for its commission, while attempt is direct movement toward commission after preparations are made.

We do not believe that it is legally significant that "Bekka" was an adult rather than a child in determining whether defendant made preparations to engage in child sexually abusive activity.

It does not change the fact that defendant was endeavoring to find a child, to entice a child to engage in sexual activity, or to arrange to meet a child for sexual activity. Assuming defendant's conduct constitutes preparing to arrange for child sexually abusive activity in general terms, then defendant engaged in such conduct whether "Bekka" was a fourteen-year-old girl or an adult male. In either case, defendant was preparing to arrange for child sexually abusive activity by chatting with and enticing someone he believed to be a child. The fact that "Bekka" was not a child merely means that defendant would not ultimately be successful in engaging in child sexually abusive activity.

Defendant's criminal responsibility, however, is not premised upon his success, but upon his preparations. Defendant relies on the Supreme Court's decision in *Tinskey, supra*. However, we believe that defendant's reliance on *Tinskey*, at least with respect to the child sexually abusive activity charge, is misplaced. In *Tinskey*, the Court held that the defendant is not guilty of conspiracy to commit abortion where the woman upon whom the abortion was to be performed was not, in fact, pregnant.[3] The Supreme Court concluded that the

---

[3]She was, in fact, a policewoman who was not pregnant. *People v Tinskey*, 49 Mich. App. 497, 499; 212 N.W.2d 263 (1973).

defendants could not be guilty because Michigan's abortion statute requires that a woman be pregnant.[4] That analysis would support our conclusions with respect to the CSC and obscene material charges: those statutes actually require conduct involving a minor, just as Michigan's abortion statute requires conduct involving a pregnant woman. However, *Tinskey* is inapplicable to the child sexually abusive activity statute because that statute does not actually require conduct involving a minor. Rather, it only requires that the defendant prepare to arrange for child sexually abusive activity. The statute does not require that those preparations actually proceed to the point of involving a child.[5]

---

[4]"Any person who shall wilfully administer to any pregnant woman . . . ." MCL 750.14; MSA 28.204.

[5]We note that *Tinskey* is seemingly at odds with cases Dressler relies upon in classifying an abortion on an unpregnant woman as factual impossibility rather than legal impossibility. However, *Tinskey* points out that abortion statutes fall into two categories: those that require the woman to be pregnant and those that do not. The *Tinskey* decision is specifically premised upon the fact that Michigan's abortion statute requires the involvement of a pregnant woman. Factual impossibility would apply to those cases where the applicable abortion statute does not make pregnancy an element of the

For the above reasons, we conclude that defendant may be guilty of child sexually abusive activity even though "Bekka" proved to be an adult rather than a child. Accordingly, the trial court erred in dismissing that charge based upon the doctrine of legal impossibility.

Affirmed in part, reversed in part and remanded to the trial court with instructions to reinstate the child sexually abusive activity count. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

---

offense.

RULING OF THE TRIAL COURT

DECISION OF
WAYNE COUNTY CIRCUIT COURT

Judge Deborah A. Thomas
May 28, 1999

Part of the statutory language of a crime requires that there be an existence of an individual that meets the legal definition. In the scenario that was presented to this Court, there was not an individual, a person who met the legal definition, the classification required by statute to fulfill all the elements of the crime, therefore it was legally impossible for this crime to have been committed under the factual scenario that was submitted. Therefor [sic], it cannot attempt to complete a crime that was—could not be completed legally. If you couldn't commit the crime legally, you couldn't attempt to commit the crime legally because the elements were not there. The Court as a matter of law and in keeping with the law will grant the motion.

EXCERPT FROM THOUSAND'S APPLICATION TO MICHIGAN SUPREME COURT FOR LEAVE TO APPEAL AS CROSS-APPELLANT

QUESTIONS PRESENTED FOR REVIEW

1. Can a defendant be convicted of (1) preparing or attempting to commit a child sexually abusive activity, (2) solicitation of criminal sexual conduct involving a child, or (3) attempted distribution of obscene material to a child, each of which requires the existence of a minor victim or potential victim as an element of the crime, where the defendant had no contact or interaction with a child, but rather communicated only with an adult police officer?

2. Should the defense of impossibility be abandoned, as is urged by the state?

3. Does this Court have the authority to take away the defense of impossibility in this case or any other case, in light of the failure of the legislature to enact a statutory ban on the defense of impossibility?

4. Can the state constitutionally criminalize the mere preparation for the commission of a crime?

EXCERPT FROM ARGUMENT REGARDING DUE PROCESS AND EX POST FACTO

It must also be pointed out that any action by this Court to modify the law regarding the defense of impossibility in this case at the time of Thousand's actions could not affect the dismissal of the charges against Thousand by the trial court, as such a modification of the legal defenses available to Thousand would constitute a violation of the prohibition on ex post facto laws if applied to him. *Bouie v. Columbia*, 378 U.S. 347 (1964) (ex post facto law is one that makes action done before passing of law, which was innocent when done, criminal, and punishes such action; judicial expansion of criminal statute, applied retroactively, operates precisely like ex post facto law; principle that required criminal law must have existed when conduct in issue occurred applies to bar retroactive criminal prohibitions emanating from courts as well as from legislatures); *Rubino v. Lynaugh*, 845 F.2d 1266 (5th Cir. 1988) (if Texas "carving" doctrine—a judicially developed rule barring multiple prosecutions and convictions for offense arising out of single criminal transaction— applied, then retroactive application of judicial decision eliminating carving doctrine denied defendant due process and undermined constitutional prohibition against ex post facto laws; due process clause protects criminal defendants against action by judiciary that would contravene Ex Post Facto Clause if done by legislature); *People v. Dempster*, 396 Mich. 700, 242 N.W.2d

381 (1976) (an interpretation of a criminal statute by a court may clarify effect of statute and thereby provide constructive notice to future defendants, but have the effect of an ex post facto law as to the present defendant because he did not have fair warning that his contemplated conduct constitutes a crime); *cf. United States v. Samuels*, 801 F.2d 1052 (8th Cir. 1986) (ex post facto clause precludes application to defendant of change in law regarding defenses; court could not apply change in insanity defense where alleged crime preceded change); *People v. Criss*, 710 N.E.2d 776 (Ill. App. 1999) (change in defense of entrapment could not be applied to defendant whose alleged crime was committed prior to change in law).

EXCERPT FROM MOTION FOR REHEARING

As was pointed out in the Brief of the Appellee, the United States Supreme Court and other courts have recognized that the retroactive taking away of a recognized defense by judicial fiat violates the constitutional prohibition on ex post facto laws. *See Bouie v. Columbia*, 378 U.S. 347 (1964) (ex post facto law is one that makes action done before passing of law, which was innocent when done, criminal, and punishes such action; judicial expansion of criminal statute, applied retroactively, operates precisely like ex post facto law; principle that required criminal law must have existed when conduct in issue occurred applies to bar retroactive criminal prohibitions emanating from courts as well as from legislatures); *Rubino v. Lynaugh*, 845 F.2d 1266 (5th Cir. 1988) (if Texas "carving" doctrine—a judicially developed rule barring multiple prosecutions and convictions for offense arising out of single criminal transaction—applied, then retroactive application of judicial decision eliminating carving doctrine denied defendant due process and undermined constitutional prohibition against ex post facto laws; due process clause protects criminal defendants against action by judiciary that would contravene Ex Post Facto Clause if done by legislature); *People v. Dempster*, 396 Mich. 700, 242 N.W.2d 381 (1976) (an interpretation of a criminal statute by a court may clarify effect of statute and thereby provide constructive notice to future defendants, but have the

effect of an ex post facto law as to the present defendant because he did not have fair warning that his contemplated conduct constitutes a crime); *cf. United States v. Samuels*, 801 F.2d 1052 (8th Cir. 1986) (ex post facto clause precludes application to defendant of change in law regarding defenses; court could not apply change in insanity defense where alleged crime preceded change); *People v. Criss*, 710 N.E.2d 776 (Ill. App. 1999) (change in defense of entrapment could not be applied to defendant whose alleged crime was committed prior to change in law).

This Court cannot avoid the constitutional ex post facto prohibitions by simply pretending that the prior law never existed. Upon rehearing, the Court must address the impossibility defense in an intellectually honest manner and apply the law of Michigan with due respect for precedent and the requirements of constitutional principles.